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IN THE

Supreme Court of the United States

October Term, 1967

No. 1261

LEWIS P. GOLDMAN,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS OR AFFIRM

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Statement

Having been duly served with a notice of appeal and jurisdictional statement on behalf of the appellant above named, the appellee herewith respectfully moves this Court to dismiss the appeal for want of a substantial federal question or, alternatively, to affirm the order of the New York Court of Appeals below summarily on the grounds that the decision was clearly in accord with controlling constitutional principles.*

* A copy of the brief for the People to the New York Court of Appeals has been lodged with the Clerk of this Court.

Argument

As the appellant notes in his jurisdictional statement, this Court has recently noted probable jurisdiction in a case testing the very issue presently urged here: the constitutionality of provisions of New York's State and City Charters which require public officers to give evidence, under waiver of immunity, concerning their public responsibility, or suffer loss of public office. In *Gardner* v. *Broderick*, 20 N.Y.2d 227, Misc. No. 635, the New York Court of Appeals clearly held that the decision of this Court in *Garrity* v. *New Jersey*, 385 U.S. 493, did not invalidate the pertinent provisions of New York law for all purposes. *Garrity*, according to the New York Court, held only that evidence procured under a waiver of immunity which is itself inherently "coerced" (as the public officers' limited waiver in New York would invariably be), could not thereafter be utilized against the officer as evidence of the substantive crime therein disclosed. But *Garrity* did not preclude the discharge of a public officer for failure to execute the waiver of immunity and testify thereunder. If the New York Court of Appeals was wrong in this construction of this Court's opinion, and the United States Constitution invalidates the State Constitution in this regard, then *Gardner* provides the vehicle for such a determination.

The *Goldman* case below rode upon the coattails of *Gardner*. It added only one corollary: a public officer in the grand jury under a waiver, protected against the future use of his testimony on a substantive charge concerning matter revealed by it, must answer truthfully and forth-

rightly. This virtually self-evident proposition by itself is not a substantial federal question. Indeed, insofar as it involves a federal question at all, the question merely reproduces, in scarcely altered form, the question already before this Court in *Gardner*.

It is also of some significance that *Gardner* was not taken up alone. To be argued along with it are two other New York cases which provide added dimension to the question: *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation,* 383 F.2d 364 (2d Cir. 1967), Misc. No. 823, and *Campbell Painting Corp.* v. *Reid,* 20 N.Y.2d 370 (1967), Misc. No. 673. Moreover, the appellee herein is informed that the three cases are tentatively scheduled for argument sometime during the third week of April, 1968. Were *Goldman* to be added to the group at this late date, it would be virtually impossible to ready the case for the calendar slot already selected for the other three. Delaying argument of those three is no more palatable an alternative than scheduling *Goldman* for a later date.

These several factors demonstrate that *Goldman* neither adds nor amplifies a federal question of substantial significance. If *Gardner* v. *Broderick* was correctly decided, then without doubt, *Goldman* was, too. And if *Gardner* is thus resolved in this Court, *Goldman* will present no residual federal question. On the other hand, if *Gardner* was incorrectly decided, and the operative law of New York is void for all purposes, then the federal question raised in *Goldman* will, in all likelihood, be answered as well.

The foregoing considerations are, if is believed, equally applicable should the defendant's passing suggestion be accepted, and the appeal be treated by this Court as an application for a writ of certiorari.

Conclusion

The appeal should be dismissed for want of a substantial federal question or, alternatively, the order appealed should be summarily affirmed as fully consonant with the United States Constitution.

If the jurisdictional statement be deemed an application for a writ of certiorari, it should be denied.

Respectfully submitted,

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March, 1968